G. HOPKINS GUY, III (State Bar No. 124811)
ERIC L. WESENBERG (State Bar No. 139696)
RORY G. BENS (State Bar No. 201674)
GABRIEL M. RAMSEY (State Bar No. 209218)
PETER J. O'ROURKE (State Bar No. 221764)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 614-7400
Facsimile: (650) 614-7401

Attorneys for Defendant
AFFINITY ENGINES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE INC., a Delaware corporation,

Plaintiff,

v.

AFFINITY ENGINES, INC., a Delaware corporation,

Defendant.

CASE NO.: C 05-00598 JW

AFFINITY ENGINES, INC.'S REPLY TO GOOGLE'S OPPOSITION TO AFFINITY ENGINES, INC.'S MOTION FOR FURTHER CASE MANAGEMENT CONFERENCE RE: SCOPE OF BRIN AND PAGE DEPOSITIONS

Date: December 5, 2005
Time: 9:00 a.m.
Judge: Hon. James Ware
Place: Courtroom 8, 4th Floor

REDACTED VERSION FOR PUBLIC FILING

I. INTRODUCTION

AEI's motion is brought to ensure that the scope of deposition topics allowed in deposing Messrs. Page and Brin is sufficient to explore REDACTED AEI's motion is about the proper scope of discovery as it relates a case Google filed, a summary judgment motion Google will submit, and an issue Google has raised. This is not a request for reconsideration of a substantive judgment, and Civil Local Rule 7-9 is not applicable; 16-10(c) is. AEI requests an opportunity to be heard on the point that the scope of the depositions of Page and Brin include the five enumerated topics discussed herein, in addition to the previously approved topic of Buyukkokten's meeting with Page and Brin. Each of the topics requested go directly to these important witnesses' knowledge REDACTED

It is proper to evaluate the appropriate scope of the depositions, in advance of the depositions themselves, so that these two important fact witnesses will not have to be called back for completion of their depositions.

II. ARGUMENT

A. AEI Filed the Instant Motion To Seek An Opportunity To Show That The Deposition Testimony Sought is Relevant To Google's Ownership Contentions

Google contends that its claim to ownership of the copyright in inCircle is based on an employment agreement between Google and Orkut Buyukkokten, and based on copyright law's work-for-hire doctrine. *See* Opp. at 3:17-20. As explained in its opening brief, by its motion for further CMC, AEI properly seeks that the scope of questioning at the depositions of Messrs. Page and Brin

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Each of the five topics that AEI seeks deposition testimony on (*See* Motion at 8:5-13) are copyright factual issues and thus should be permitted in deposition, as explained in further detail below.

1. **Deponents' Understanding Or Belief That** REDACTED

Google contends that Buyukkokten's work on inCircle was within the scope of his employment at Google, and that Google owns the results of that labor pursuant to the work for hire doctrine. Google also argues that their ownership is based on the terms of the Orkut/Google employment agreement itself.

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Furthermore, AEI believes that events occurring both prior to and after the meeting are relevant and admissible evidence relating to Google's understanding REDACTED This makes them appropriate issues for discovery through deposition of these witnesses.

2. **Deponents'** REDACTED

Whether Messrs. Page and Brin were REDACTED is relevant to Google's current claim of ownership in the copyright to inCircle, to whether Google filed its copyright application for inCircle in good faith, and to AEI's claim to ownership of the copyright in inCircle. As explained in AEI's opening brief, AEI has uncovered evidence in a related case establishing that REDACTED AEI should be permitted to explore this topic at the depositions of Messrs. Page and Brin.

3. **Deponents'** REDACTED

Google's written employment agreement with Buyukkokten expressly contemplates that Google employees may be concurrently employed elsewhere, and prohibits use or disclosure of concurrent employer's trade secrets (*See* Bens Reply Decl. at Ex. 1 (Buyukkokten's Employment Agreement with Google at G000014, ¶ 2b). Google's copyright ownership claim in inCircle is directly affected by this provision of the employment agreement. Accordingly, AEI should be permitted to explore Messr. Page and Brin's knowledge

4. **Deponents'** REDACTED

This group of topics is interrelated with each of the first three topics described immediately above, and thus is relevant for at least each of the reasons given for topics (1) –(3) *supra*. Further, this group of topics addresses Buyukkokten's work on Club Nexus that was completed before his meeting with Messrs. Page and Brin. Google contends that, through its employment agreement with Buyukkokten, it has a royalty-free, non-exclusive license to use that work in any future Google product. AEI believes that Google,

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Thus, Google's naked contention that is "irrelevant" to the issue of Google's ownership of the copyright in inCircle is inconsistent with the facts. Further, while AEI will brief this issue more fully in its opposition to Google's summary judgment motions, Buyukkokten had no rights in inCircle to grant to Google by virtue of his employment agreement, because he had previously encumbered any prospective rights he may have had in Club Nexus and inCircle. AEI contends that REDACTED

5. **Issues Regarding Bias or Interest of the Deponents**

The potential bias or interest of a witness in the outcome of a litigation is appropriately considered as a topic to be explored in deposing that witness. *See* FRE 806 (attacking and supporting credibility of a witness). These witnesses have both a pecuniary interest and an emotional/personal interest in this litigation.

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Messrs. Brin and Page are co-Presidents of Google, and are estimated to have a net worth of $11 billion dollars, based on Google's own SEC filings, each owned approximately 36.5 million shares of Google stock as of the end of March, 2005. *See* Bens Reply Decl. Ex. 13. Google has already produced documents in the co-pending State Court Matter which evidence Google's

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See

Because Messrs. Page and Brin have an emotional and pecuniary interest in the outcome of this litigation, the success of Orkut.com, and the demise of competitor AEI, AEI should be able to explore these interests during their depositions.

Contrary to Google's assertion, explanation of the relevance of the deposition topics mentioned here was provided in AEI's opening brief (*See* Mot. at 7:8-9:3.) These deposition topics were not determined to be desirable by mere "speculation" by AEI, as Google contends. Google set forth its alleged legal bases for ownership of the copyright to inCircle-- Buyukkokten's employment agreement with Google and the work-for-hire doctrine-- nine months ago, when it filed its complaint with this Court. As explained *supra* and in AEI's opening brief,

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AEI will be severely prejudiced in its ability to defend against Google's motion for summary judgment if it is not provided the opportunity to explore at least the topics listed above during the Brin and Page depositions, regardless of what appears in Google's summary judgment motion on ownership.

B. **Consideration of The Propriety of A Further Case Management Conference To Consider the Scope of the Depositions of Messrs. Page and Brin On December 5th Is Practical and Efficient**

As explained in its opening brief, Monday, December 5, 2005 is the only possible date for a Case Management Conference on the Court's regular calendar, so that the conference can be timed to occur after Google files its summary judgment motions and before the depositions of Messrs. Page and Brin commence. (*See* Mot. at 9:4-13) Thus, Google's argument that AEI should seek the assistance of the Court only after Google has filed its summary judgment motions is nonsensical-that is exactly what AEI is doing here. The hearing is timed such that the Court may consider the propriety of conforming the scope of the depositions to the motion include the five topics enumerated herein, in addition to the previously ordered topic of the meeting between Page, Brin, and Buyukkokten, and whatever other topics might be appropriate based on other arguments appearing in Google's summary judgment motion on ownership, before the depositions commence. Google says nothing to back up its claim that noticing the hearing on AEI's motion, requesting the CMC for the same day that it requests the CMC itself, is "impractical." In fact, it is not impractical-- if the motion for further CMC is granted by the Court, then the CMC is held shortly thereafter the same day, several days after the filing of Google's summary judgment motions. No prejudice is visited on Google by the manner or timing of AEI's hearing on its request for a further Case Management Conference.

Further, Google devotes a portion of its opposition brief to explaining how busy Messrs. Page and Mr. Brin are, and submit a declaration by an administrative assistant to Page and Brin (earlier submitted in Google's unsuccessful motion to quash in the co-pending State Court Matter) in that regard. If the deponents' schedules are crowded, then, in view of that, and in view of the potential for prejudice to AEI in defending against Google's summary judgment motions without adequate deposition discovery from Messrs. Page and Brin, it is completely appropriate for the Court to consider that issue before the depositions begin, so that Google can avoid having to schedule two additional and avoidable deposition appearances for each of its busy co-Presidents.

C. Judge Elfving's Order In the Co-Pending State Court Action Finds That Messrs. Brin and Page Have Unique Knowledge Concerning Ownership

Google concedes that Judge Elfving's order in the co-pending State Court Action requires Messrs. Page and Brin to appear at deposition and testify concerning (1) ownership of the inCircle software at issue; (2) Google's hiring of Mr. Buyukkokten; and (3) Google's decision to convert Mr. Buyukkokten's prototype software, which plaintiff claims it owned. (*See* Opp.at 4:1-4; Kramer Decl. Ex. A) That Order represents a finding by that Court that both Messrs. Page and Brin REDACTED (If that was not the case, then presumably the Court would not have issued the order that it had,

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AEI respectfully submits that Judge Elfving's order, issued more than six months ago after full briefing by the parties and a hearing, suggests that the scope of deposition for Messrs. Page and Brin in this case (which solely concerns, as Google admits, ownership of the copyright in inCircle) is appropriately expanded beyond the topic of the meeting between Buyukkokten, Page and Brin to include at least the five topics enumerated *supra*, regardless of what appears in Google's summary judgment motion. At the time of the hearing, AEI will have received Google's summary judgment papers, and would be able to advise what other topics, if any, would be appropriately explored in the depositions of Messrs. Page and Brin.

D. AEI's Motion, Brought Under Civil L.R. 16-10(c), Is Procedurally Proper

AEI brought its motion pursuant to FRCP 16 and Civil L.R. 16-10(c), and in doing so promotes the purposes of those rules, including "discouraging wasteful pretrial activies." Google concedes as much, ignoring these rules entirely in its opposition papers. By its motion, AEI merely requests a further case management conference as an opportunity to be heard concerning the appropriate scope of deposition of two fact witnesses who have been determined by another court to have REDACTED before those depositions take place. Google contends the two fact witnesses are busy executives, and therefore it makes sense to evaluate the appropriate scope of deposition, before the depositions commence, so as to avoid scheduling two appearances by each of the witnesses for deposition, instead of one. Such a request promotes the policies underlying FRCP 16 and Civil L.R. 16-10(c), and certainly does not constitute sanctionable conduct. Further, an Order to Show Cause is not appropriate under these circumstances.

AEI's motion is based on a discovery-based issue, not on "a judgment adjudicating all of the claims and the rights and liabilities of all of the parties in a case," as recited in L.R. 7-9. Accordingly, contrary to Google's assertion, none of the provisions of that local rule apply—only Civil L.R. 16-10(c) does.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in its opening brief, AEI respectfully requests granting of a further Case Management Conference on December 5, 2005, to consider the appropriate scope of deposition for Google percipient fact witnesses Larry Page and Sergey Brin.

Dated: November 21, 2005

G. HOPKINS GUY, III
ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ G. Hopkins Guy
Attorneys for Defendant
Affinity Engines, Inc.